87-1233

No. _____

Supreme Court, U.S.
FILED
JAN 14 1988
JOSEPH F. SPANIOL, JR.
CLERK

In the

Supreme Court of the United States

October Term, 1987

Edward William MacDonald,

Petitioner,

v.

United States of America,

Respondent.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Eighth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the facially improper joinder of Petitioner with another defendant, charged with entirely separate and unrelated offenses, prejudiced petitioner.[1]

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1. In addition to the parties listed in the caption, co-defendant Dennis Frank Sazenski was a party to the proceedings. Pursuant to Supreme Court Rule 19.4, Petitioner joins in Dennis Sazenski's Petition for a Writ of Certiorari (which has been or shortly will be filed) requesting review of the other main issue before the Eighth Circuit, the improper amendment of the indictment.

TABLE OF CONTENTS

	Page
Questions Presented.....	i
Table of Authorities.....	iii
Opinions Below.....	1
Jurisdiction.....	2
Constitutional Provisions and Federal Rules.....	2
Statement of the Case.....	4
Reasons for Granting the Petition...	16
Conclusion.....	26
Appendix A.....	1a
Appendix B.....	26a
Appendix C.....	28a
Appendix D.....	31a

TABLE OF AUTHORITIES

Cases: Page

United States v. Hatcher, 680 F.2d 438 (6th Cir. 1982).....23

United States v. Lane, ___U.S.___, 106 S.Ct. 725, 88 L.Ed.2d 814 (1986).....14, 16 21, 23 24

United States v. Sampol, 636 F.2d 621 (D.C. Cir. 1980).....23

United States v. Satterfield, 548 F.2d 1341 (9th Cir. 1977).....20, 21 22

Constitutional Amendments:

U.S. Const. amend. V.....2

Statutes:

28 U.S.C. §1254(1).....2

Federal Rule of Criminal Procedure:

Federal Rule of Criminal Procedure 8(b).....2

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eighth Circuit, reproduced in petitioner's Appendix A, infra, is not yet reported.

JURISDICTION

The judgment of the Court of Appeals (Appendix B, infra) was entered on November 16, 1987. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISIONS AND FEDERAL RULES

United States Const., amend. V:

> No person shall be ... deprived of life, liberty, or property, without due process of law ....

Federal Rule of Criminal Procedure 8(b):

> Two or more defendants may be charged in the same indictment or information if they are alleged to have participated in the same act or transaction or in the same series of acts or

transactions constituting an offense or offenses. Such defendants may be charged in one or more counts together or separately and all of the defendants need not be charged in each count.

STATEMENT OF THE CASE

Before September 17, 1986, the date charged in the indictment[2] as the beginning of the alleged conspiracy to possess marijuana with intent to distribute, Petitioner Edward William MacDonald, hereafter MacDonald, had no connection with illegal drugs. In addition, MacDonald had no connection with drug-dealing activities of his co-defendant Dennis Sazenski and the other alleged co-conspirator, Joseph Sazenski. However, on September 17, 1986, MacDonald arrived at the Radisson Hotel bar in Plymouth, Minnesota where he met undercover officer Michael Leonard and paid-government-informant Michael Denny (Trial Trans.,

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2. The basis for jurisdiction in the trial court was 18 U.S.C. 3231.

pp. 79-84).

Agent Leonard represented himself to be a large-quantity marijuana dealer who was going to bring a large quantity of marijuana to Minnesota within a couple of weeks. MacDonald represented that he had a financier named "John" who would buy two thousand pounds (Trial Trans., p. 84). Informant Denny was to purchase two thousand pounds for a drug dealer. Also, Dennis Sazenski said he had a partner who would buy the marijuana and that his partner had made millions of dollars in the drug business (Ibid).

For the next two weeks, Agent Leonard and informant Denny prepared their "reverse" marijuana scheme. Dennis Sazenski and MacDonald met with Agent Leonard and informant Denny at a "bugged" Holiday Inn motel room in Brooklyn Cen-

ter, Minnesota. (Trial Trans., pp. 87-89). At this meeting MacDonald claimed "John" had his money and was ready to go (Trial Trans., p. 93). MacDonald was to meet with Agent Leonard at noon the next day at the Embassy Hotel in Bloomington, Minnesota (Trial Trans., p. 102).

However, on the morning of October 2, 1986, when MacDonald met with Agent Leonard, he said "John" needed more time to get his money together (Trial Trans., p. 104). Dennis Sazenski at this same meeting mentioned that he would contact "one of his financiers," Joey, "to get a share of the money" from him. (Trial Trans., p. 103). Later that morning, surveillance officers followed MacDonald to the house of a John Veitsch. He entered the house for a short time and then returned to the Embassy Suites Hotel

(Trial Trans., pp. 461-62). During the next twenty-four hours, surveillance officers saw on two different occasions MacDonald, Dennis Sazenski and Joseph Sazenski together in an automobile (Trial Trans., pp. 463-64; 279-81).

The next day, October 3, 1986 at 1:50 p.m., MacDonald and Dennis Sazenski met with Agent Leonard and informant Denny at another bugged hotel room at the Ramada Hotel in Bloomington, Minnesota (Trial Trans., p. 110). Dennis Sazenski told Agent Leonard that his cousin Joey Sazenski was going to buy some of the marijuana (Trial Trans., pp. 123-24). At 2:15 p.m., Dennis Sazenski left the room alone to contact Joey (Trial Trans., p. 123). He returned to the room at 2:25 p.m. and discussed his cousin Joey and how he was going to buy the marijuana

(Trial Trans., p. 128). MacDonald stated he didn't care what price Joseph Sazenski got for the marijuana (Trial Trans., p. 128).

MacDonald then left the room to work-out and jog (Trial Trans., p. 129). MacDonald said that his connection "John" would be waiting and ready to go at 4:00 p.m. (Trial Trans., p. 128). Agent Leonard left the room at 3:15 p.m. leaving informant Denny and Dennis Sazenski alone in the room. At 4:55 p.m. Agent Leonard returned to the room (Trial Trans., p. 130). Dennis Sazenski left the room by himself at 5:00 p.m. to contact "his man" Joey Sazenski (Trial Trans., p. 131). Dennis Sazenski returned at 5:35 p.m. Shortly after he returned, MacDonald arrived at the room and claimed he was still having trouble locating "John"

(Trial Trans., p. 131).

At 6:00 p.m., MacDonald departed the room claiming he was trying to contact "John" (Trial Trans., p. 131). At 6:35 p.m. Joseph Sazenski arrived at the room (Trial Trans., p. 132). Within minutes, MacDonald returned to the room without "John" (Trial Trans., p. 138). Informant Denny told Agent Leonard and MacDonald to leave the room so he, Denny, and the two Sazenski's could talk about the marijuana purchase (Trial Trans., p. 138). MacDonald came back to the room about 6:50 p.m. with Agent Leonard but did not enter the room. He departed the hotel saying he was going to try to call Vietsch (Trial Trans., pp. 138-39).

Joe Sazenski then decided a few minutes later to go with Agent Leonard to pick up the money he needed for the deal

(Trial Trans., pp. 139-40). They drove in Joe Sazenski's van to the Budgetel Hotel in Bloomington, Minnesota where Sazenski got $115,000 (Trial Trans., pp. 143-45). From there Sazenski traveled to a place called the Vault to pick up additional cash (Trial Trans., p. 146). After obtaining the necessary cash, $485,000, Sazenski and Agent Leonard traveled to a hangar at the Crystal, Minnesota airport where Sazenski was arrested after he began loading bails of marijuana into his van (Trial Trans., p. 159).

After Joe Sazenski's arrest, Dennis Sazenski and MacDonald were contacted at the Ramada Hotel room. MacDonald still had not contacted "John." MacDonald and Dennis were invited by Denny to the airport where the marijuana was located. At the airport, after MacDonald refused to

place any marijuana in his car, he and Dennis Sazenski were arrested (Trial Trans., pp. 159-64, 221).

The Indictments, Pretrial Procedure, and Joinder.

Dennis Sazenski was charged in two indictments. The first indictment was for three counts of cocaine distribution between January 22, 1986 an April 18, 1986 (App. C, infra). The second indictment was for the marijuana scheme occurring between September 16, 1986 and October 3, 1986 (App. D, infra). MacDonald was charged with only the marijuana conspiracy in the second indictment. (Count II of this indictment was dismissed prior to trial.)

On December 2, 1986, the government moved for consolidation of both indict-

ments. On December 9, 1986, Magistrate Symchych granted the motion to consolidate. Counsel for MacDonald filed an exception to the Magistrate's ruling. The trial court, however, denied the exception and granted joinder. MacDonald renewed his motion for severance, which was denied by the trial court. Trial commenced on December 12, 1986. On December 16, 1986 counsel for MacDonald again moved for severance and a mistrial (Trial Trans., pp. 296-97). On December 17, 1986 after the close of the government's case, counsel again moved for severance and judgment of acquittal (Trial Trans., p. 510). All motions were denied.

Thus, the three cocaine sales that did not involve MacDonald and which occurred five months before the marijuana scheme that allegedly did involve Mac-

Donald were tried together. The only defendant named in the consolidated indictment not involved in Dennis Sazenski's cocaine counts was MacDonald.

A unanimous panel of the Eighth Circuit Court of Appeals found that the joinder in this case under Rule 8(b) was clearly improper:

> MacDonald had absolutely no connection to the cocaine transactions that took place between Dennis Sazenski and the government informant five months before the marijuana conspiracy was alleged to have begun.

App. A at 20a-21a.

The Eighth Circuit dismissed the government arguments that joinder was correct because the separate cocaine dealings "provided the genesis" of the marijuana operation and because the same informant was involved in both the

cocaine and marijuana transactions (App. A at 21a). The Eighth Circuit reasoned that the former argument was irrelevant because it failed to address how MacDonald was connected to the cocaine dealings, and the latter argument was invalid because it would support joinder for trial of every defendant with whom a government informant transacted (Ibid.).

The Eight Circuit affirmed, however, because it found that the misjoinder did not result in actual prejudice to MacDonald (App. A at 24a). The court analyzed the prejudice issue in light of United States v. Lane, ___U.S.___ 106, S.Ct. 725, 732 (1986) and found that the trial court's cautionary instruction, the admissibility of the cocaine dealings to rebut Sazenski's entrapment defense, the separability of the cocaine transactions

from the marijuana conspiracy, and the fact that there were only two defendants, prevented actual prejudice (App. A at 22a-23a).

REASONS FOR GRANTING THE PETITION

The Eighth Circuit's finding that the misjoinder did not prejudice MacDonald represents a denial of due process and a misinterpretation of Federal Rule of Criminal Procedure 8(b) that so far departs from the excepted and usual course of judicial proceedings as to call for the exercise of this court's power of supervision.

Although it is now established that misjoinder does not require automatic reversal, United States v. Lane, ___U.S.___, 106, S.Ct. 725, 732, 88 L.Ed.2d 814 (1986), the Eighth Circuit's ruling that the misjoinder in this case did not result in prejudice is simply not supported by the facts of the case, which more than amply demonstrated actual

prejudice to MacDonald. Not only did the misjoinder confuse the jury, it resulted in a "spillover" of prejudicial evidence admissible only as to the cocaine counts of the indictment.

1. That the MacDonald jury was confused requires no speculation: there is evidence that during deliberations the jury found itself seriously confused as to the proof in the case. After two days of deliberations, the jury asked the court:

> We the jury are confused about the wording of the conspiracy indictment - must the conspiracy include Joseph Sazenski or could the conspiracy be between only Dennis Sazenski and Bill MacDonald?

App. A at 10a.

Several circumstances attending the asking of this question require emphasis. First, this was obviously not an "easy"

or simple case, especially in light of the length of the trial (over five days), and the length of the jury deliberations (two and one-half days).

Second, the jury's question went to the sorting or "compartmentalization" of the evidence vis-a-vis the conspiracy charges, the heart of the case against MacDonald, whose defense was that he never participated in the marijuana conspiracy.

Third, the jury deliberated for two and one-half days before asking the conspiracy-evidence question and a verdict was returned ten minutes after the court's response to the question. These factors demonstrate that this jury was confused <u>in fact</u> about the evidence it heard and how to categorize it in considering the conspiracy charges.

Additionally, joinder of the cocaine and marijuana conspiracy charges complicated this case to such an extent that jury confusion had to occur. The charge against MacDonald was not simple narcotics possession-distribution, but a conspiracy charge that required proof of some degree of MacDonald's cooperation or participation with one or more other persons in marijuana trafficking. The trial court instructed the jury at the beginning of trial that it would hear evidence of a marijuana conspiracy and evidence of cocaine trafficking. The marijuana conspiracy evidence, however, related to prosecutions of both defendants, Dennis Sazenski and Bill MacDonald. The cocaine conspiracy evidence related only to the prosecution of Dennis Sazenski. The jury heard evidence that the cocaine traffick-

ing involved Bill Sazenski, Joseph Sazenski (both implicated with MacDonald on MacDonald's indictment) a Lawrence Main, and a Paul DeGidio, and evidence of marijuana trafficking that allegedly involved all the above, plus Bill MacDonald. This tangle of evidence had to confuse the jury when it assessed the proof against the defendants.

2. In addition to jury confusion, there is no doubt that the misjoinder tainted MacDonald in other ways. In considering the "spillover" analysis, it is significant that in a separate trial the Dennis Sazenski-cocaine evidence would have been positively inadmissible for lack of relevance or probative value, and inherent prejudice. In United States v. Satterfield, 548 F.2d 1341 (9th Cir. 1977), for example, the two defendants

were jointly tried for bank robbery. The indictment charged five robberies, all of which involved defendant Harvey Merriweather, but only two of which involved his co-defendant, Robert Satterfield. Satterfield's conviction was reversed following a harmless-error misjoinder analysis Id. at 1345-47. (The Ninth Circuit was on the harmless error side of the rule 8(b) split before Lane -- See Satterfield n. 3, p. 1346; Lane, n. 1 at S.Ct. 727). Wrote the Satterfield Court:

> At a joint trial, where one defendant is charged with offenses in which the other defendants did not participate, the detailed evidence introduced to establish guilt of the separate offenses may shift the focus of the trial to crimes of the single defendant. In such cases, co-defendants run a high risk of being found guilty merely by association . . . It is also significant that where evidence of prior criminal acts is proffered, the trial court has discretion to limit, or

> even to exclude, such evidence if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence. (citations omitted) Where multiple offenses are charged in an indictment, however, a trial judge must permit the prosecution to establish each of those offenses beyond a reasonable doubt.

This discussion indicates the Ninth Circuit Court's sensitivity to the fact that because of the construction of the Satterfield indictment, the appellant's trial below included admission as against Merriweather of evidence that clearly would not have been permitted to go to the jury had Satterfield been tried alone.

And, "(i)nstructions to the jury to consider the proof against each defendant

separately do not replace adherence to the requirements of Rule 8(b)." United States v. Hatcher, 680 F.2d 438, 442 (6th Cir. 1982). The holding in Hatcher was made in the course of a prejudice analysis, which Lane adopted. See Lane, n. 13 at S.Ct. 732-733 (limiting instructions may not always cure prejudice). See also United States v. Sampol, 636 F.2d 621, 642-46 (D.C. Cir. 1980).

Finally, in assessing prejudice, it must be noted that in two prominent cases in which no prejudice was found, (unlike the case at bar) the disputed evidence would have been admitted anyway and the appellate courts placed significant reliance on this fact. Lane, 106 S.Ct. at 732; United States v. Leuth 807 F.2d 719, 730 (8th Cir. 1986).

Consistent with the Satterfield

analysis, had MacDonald gone to trial alone, the cocaine evidence involving multiple transactions and parties with whom he had no connection would have been wholly excluded and not admitted into evidence under any circumstances. The admission of such evidence clearly tainted MacDonald's defense, and the "curative" instructions here did not effectively counter-balance the prejudicial effect of the misjoinder.

From the foregoing, it is apparent that the potential for MacDonald's being convicted as a result of prejudicial "spillover" and "guilt by association," was wrongfully and impermissibly escalated by the misjoinder, which the trial court's instructions could not and did not cure.

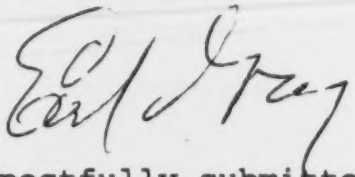
Lane requires the trial court to

grant severance when joinder is facially improper, regardless of prejudice. 106 S.Ct. at 732 n. 12. To ensure defendants' due process rights, and to prevent federal trial courts from improperly failing to grant severance, when they obviously know they should, in the hope that an appellate court will find no prejudice, this Court must exercise its supervisory power and reverse Petitioner's conviction.

CONCLUSION

The Petition for a Writ of Certiorari should be granted.

Dated: January 6, 1988.



Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

No. 87-5099

United States of America, *

Appellee, *

v. *

Dennis Frank Sazenski, *

Appellant. *

Appeals from the United States District Court for the District of Minnesota.

No. 87-5110

United States of America. *

Appellee, *

v. *

Edward William MacDonald, *

Appellant. *

Submitted: September 4, 1987

Filed: November 16, 1987

Before LAY, Chief Judge, FLOYD R. GIBSON, Senior Circuit Judge, and MAGILL, Circuit Judge.

LAY, Chief Judge.

Dennis Frank Sazenski and Edward William MacDonald appeal their drug-related convictions. Both were convicted of one count of conspiracy to possess marijuana with intent to distribute, in violation of 21 U.S.C. §§ 841(a)(1) and 846; additionally, Sazenski was convicted of three counts of distributing cocaine in violation of 21 U.S.C. §841(a)(1). The

two were jointly tried and convicted in district court.[1] As grounds for reversal they assert that (1) the trial judge's instruction to the jury on the conspiracy charge constructively amended the indictment or constituted a prejudicial variance; (2) MacDonald was prejudiced by the misjoinder of the cases and denial of his motions for severance; and (3) Sazenski was prejudiced by the district court's error in admitting $480,000 in cash into evidence. We affirm.

Background

A DEA informant made three separate purchases of cocaine from Dennis Sazenski

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1. The Honorable Harry H. MacLaughlin, United States District Judge for the District of Minnesota.

on January 22, April 15, and April 18, 1986. These three purchases formed the basis for Sazenski's cocaine convictions, which he does not appeal. MacDonald was not involved in any of these transactions. In fact, the indictment charged that the conspiracy began on or about September 16, 1986, almost five months after the last of the cocaine transactions.

On August 30, 1986, Sazenski asked the informant if he wanted to buy more cocaine. The informant declined but said that he was putting together a sale of 2000 pounds of marijuana. At a meeting on September 17, 1986, Sazenski was introduced to DEA Special Agent Leonard, who was posing as a drug dealer. At this meeting, Sazenski introduced MacDonald as

his partner.

On October 1, 1986, Sazenski and MacDonald were given samples of the marijuana and the alleged conspirators arranged to purchase a total of 6200 pounds. This included the 2000 pounds that the informant was to sell.

The purchase took place on October 3, 1986. On that day, MacDonald kept trying to contact someone named John, his supposed source for the money needed. Sazenski's source of funds was his cousin Joseph Sazenski. Joe and Agent Leonard drove to various places while Joe collected $480,000 in cash. The two then went to the airport hangar where the marijuana was stored. Joe was arrested after loading eight bales in his van.

Sazenski said he wanted to split the profits from Joe's deal. MacDonald declined to put any marijuana in his car, but said they should split the profits. At that point, both Sazenski and MacDonald were arrested. Joe pled guilty -- the other two stood trial.

Amendment of Indictment

The first issue on appeal concerns asserted discrepancies between the conspiracy indictment and the trial court's responses to certain questions from the jury. The original indictment presented to the grand jury read in pertinent part as follows:

> From on or about September 16, 1986, in the State and District of Minnesota, the defendants,

JOSEPH MICHAEL SAZENSKI,
DENNIS FRANK SAZENSKI, and
EDWARD WILLIAM MACDONALD,

did knowingly and willfully conspire and agree together to possess with intent to distribute approximately 6200 pounds of marijuana * * *.

Before trial, the district court, on its own motion, amended the indictment, presumably because Joseph Sazenski had entered a plea of guilty. The amended indictment read in pertinent part as follows:

From on or about September 16, 1986 to October 3, 1986, in the State and District of Minnesota, the defendants,

DENNIS FRANK SAZENSKI
and EDWARD WILLIAM MACDONALD

did knowingly and willfully conspire and agree together with Joseph Michael Sazenski to possess with intent to distribute approximately 6200 pounds of marijuana * * *.

Neither the defendants nor the government objected to the amendment.

During deliberations, the jury submitted two questions to the trial judge concerning the conspiracy indictment. The trial judge's answers to those questions permitted the jury to convict the defendants of conspiracy without finding that the conspiracy included Joseph Sazenski.[2]

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2. The discussion of the first question about the conspiracy charge was as follows:

> THE COURT: Members of the jury, I received another indication from you that reads as follows:
>
> "We, the jury, need clarification of the indictment naming Dennis Sazenski and Edward MacDonald. Does the indictment concern the men as one entity or singly with Joseph Sazenski? If so, why the separate verdicts?" And signed by the foreperson.

The defendants contend that the trial court's responses thus constructively amended or created a prejudicial variance

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I am going to try to answer it. I'm not sure I totally understand it. I will try to answer it.

First of all, Joseph Sazenski is not a defendant in this action. You are not called upon to find his guilt or innocence, although he could have been involved in an underlying conspiracy, pursuant to the instructions that I gave to you.

The two defendants that you are called upon to reach a verdict on, Dennis Sazenski and Edward MacDonald, with respect to them, you could find both of them not guilty of conspiracy; you could find both of them guilty of conspiracy; you could find Dennis Sazenski to be guilty of conspiracy and Edward MacDonald to be not guilty of conspiracy; or you could find Edward MacDonald to be guilty of conspiracy, and Dennis Sazenski to be not guilty of conspiracy.

So that it's up to you as to the finding of the guilt or

from the indictment, because, they argue, the indictment as amended before trial required the jury to find that Joseph

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> innocence as to each of those two Defendants in this case on the count of conspiracy and any way that you would want to do it, bearing in mind that you are to look at the evidence that relates to each of these two Defendants, and follow the instructions that I gave to you.

Transcript at 649-50. The jury later presented another question:

> THE COURT: Members of the jury, I have your most recent question which reads, "We, the jury, are confused about the wording of the conspiracy. Must the conspiracy include Joseph Sazenski, or could the conspiracy be between only Dennis Sazenski and Bill MacDonald?" Signed by the foreperson.
>
> My answer is as follows: You are instructed that, as I have indicated to you earlier in the instructions, two or more persons are necessary to form a conspiracy. In response to your question, Dennis Sazenski and Bill MacDonald

Sazenski participated in the conspiracy before it could find either MacDonald or Dennis Sazenski guilty of conspiracy. We disagree with the defendants' interpreta-

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could form a conspiracy between the two of them.

On the other hand, Joseph Sazenski could be involved in the conspiracy with the two Defendants, or Joseph Sazenski could be involved in the conspiracy with either of the two Defendants; that is, Joseph Sazenski and Dennis Sazenski, or Joseph Sazenski and Bill MacDonald.

In direct answer to your question, the conspiracy could be between Dennis Sazenski and Bill MacDonald.

Remember, as I told you earlier, a conspiracy cannot consist of just one person plus a Government agent or Government informant. In other words, it must be two or more other than a Government agent or Government informant.

Transcript at 661.

tion of the amended indictment.

Initially, it is clear that the original indictment and the indictment as amended before trial charged the same offense. Although the trial court generally has no power to amend an indictment even with the defendant's consent, see United States v. Norris, 281 U.S. 619, 623 (1930),[3] that rule is inapplicable when

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3. Some courts and commentators have questioned whether this rule retains its viability after the adoption of the Federal Rules of Criminal Procedure. See, e.g., United States v. Milestone, 626 F.2d 264, 266-67 (3d Cir.) ("* * * it has been held that even if the defendant consented to an amendment, jurisdiction would not be conferred on the court, although this proposition is questionable today since Fed. R. Crim. P. 7(b) permits a defendant to waive an indictment altogether in noncapital cases.") (citations and footnote omitted), cert. denied, 449 U.S. 920 (1980); C. Wright, Federal Practice and Procedure Criminal §127 at 417 (1982) ("there are occasional statements in the cases that an indictment cannot be amended even with the con-

the court's change in the indictment is one of form only. See United States v. Nabors, 762 F.2d 642, 647 (8th Cir. 1985)(exception to rule has been recognized "where mere surplusage is eliminated ('merely a matter of form'), nothing is added to the indictment, and the remaining allegations state the essential elements of an offense.") (citing United States v. Burnett, 582 F.2d 436,

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sent of the defenant. If taken literally these would be indefensible. Except in capital cases a defendant may waive indictment altogether and consent to be proceeded against by information. * * * When the other great rights protected by the Constitution, such as right of counsel and right to trial by jury, are waivable by the defendant, it would be quite surprising if the right here in question could not be waived.") (footnotes omitted). We need not decide this question, however, because we hold that the change to the indictment in this case was one of form only, and such changes may be made with or without the defendant's consent.

438 (8th Cir. 1976)). We are convinced that the court's pretrial change in the indictment was one of form only; despite the slight change in wording, both the original and amended indictments charged a single conspiracy between MacDonald, Dennis Sazenski, and Joseph Sazenski.[4]

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4. We are convinced that the pretrial change in the indictment was not one of substance for several reasons. First, the trial judge presumably felt that he was making only a wording change to reflect the fact that Joseph Sazenski was no longer a defendant. He thus moved Joseph Sazenski's name from the capitalized and indented list of defendants to the body of the count. We reject the defendants' implicit contention that we should presume that the trial judge intended thereby to effect a substantive change in the charge returned by the grand jury.

Second, neither the defendants nor the government objected to the change. The government almost certainly would have objected had it perceived that the amendment changed the substantive theory on which it had to prove its case.

Finally, the defendants' argument would require us to hold that an indictment reading "A, B, and C conspired" is

As one court has stated, the question whether there has been an impermissible amendment of a conspiracy indictment must be resolved by asking

> whether there has been a modification of the elements of the crime from that charged by the grand jury to that presented to the petit jury. The "gist" of a conspiracy * * * "is agreement among the conspirators to commit an offense attended by an act of one or more of the conspirators to effect the object of the conspiracy." * * * The existence of an agreement, rather than

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substantively different from an indictment reading "A and B conspired together with C." A holding that the latter but not the former requires the jury to find that C participated in the conspiracy before it can convict either A or B is particularly anomalous when "C" is replaced with "unnamed persons." In neither case would the government have to prove that unnamed persons participated in the conspiracy; the defendants' argument, however, would require just such proof in the latter case based purely on a word order difference in the indictments.

> the identity of those who agree, is essential to prove the crime of conspiracy.

United States v. De Cavalcante, 440 F.2d 1264, 1272 (3d Cir. 1971) (quoting United States v. Falcone, 311 U.S. 205, 210 (1940)); see also United States v. Williams, 798 F.2d 1024, 1032-33 (7th Cir. 1986) (court need not instruct the jury to find specific roles corresponding to the co-conspirators; no constructive amendment of conspiracy indictment when the court did not omit any of the essential elements of a conspiracy charge).

It is an elementary principle of conspiracy law that the government need not prove that all persons alleged to have been members of the conspiracy actually participated in the conspiracy.

See, e.g., United States v. Reese, 775 F.2d 1066, 1071 (9th Cir. 1985) ("[T]he government's failure to connect an individual to a charged conspiracy is not a fatal variance."); United States v. Bell, 651 F.2d 1255, 1258 (8th Cir. 1981); E. Devitt & C. Blackmar, Federal Jury Practice and Instructions section 27.04 (1977) ("The evidence in the case need not establish * * * that all of the persons charged to have been members of the alleged conspiracy were such.") Thus, the trial court did not modify the elements of the crime charged by instructing the jury that it need not find that Joseph Sazenski participated in the conspiracy. The jury was still required to find that at least two people other than a government informant agreed together to possess with intent to distribute 6200 pounds of

marijuana. Proof that Joseph Sazenski participated in the conspiracy was not a necessary element of the government's conspiracy case against MacDonald and Dennis Sazenski. We hold, therefore, that the trial court's responses to the jury's questions did impermissibly amend the indictment.

Misjoinder

MacDonald next argues that joinder of his trial on the marijuana conspiracy indictment with Sazenski's trial on the cocaine charges was improper under Federal Rule of Criminal Procedure 8(b)[5]

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5. Rule 8 (b) provides:

> Two or more defendants may be charged in the same indictment or information if they are alleged to have participated in the same act or transaction or

because there was no connection between the marijuana and cocaine transactions. He further argues that the misjoinder prejudiced him by confusing the jury and by creating a "spillover" effect. We agree that the defendants were misjoined under Rule 8(b), but, after a complete review of the record, are unable to find that MacDonald was prejudiced by the misjoinder.

We have repeatedly observed that for joinder of defendants under Rule 8(b) to be proper, there must be "'some common activity involving all of the defendants

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> in the same series of acts or transactions constituting an offense or offenses. Such defendants may be charged in one or more counts together or separately and all of the defendants need not be charged in each count.

which embraces all the charged offenses even though every defendant need not have participated in or be charged with each offense.' * * * Furthermore, to be part of the 'same series of acts,' the offenses charged must be part of one overall scheme about which all joined defendants knew and in which they all participated." United States v. Grey Bear, Nos. 86-5264, 5265, slip op. at 24 (8th Cir. Sept. 14, 1987) (quoting United States v. Bledsoe, 674 F.2d 647, 656 (8th Cir.), cert. denied, 459 U.S. 1040 (1982)).

Thus, the impropriety of joinder on this case is clear. MacDonald had absolutely no connection to the cocaine transactions that took place between Dennis Sazenski and the government informant

five months before the marijuana conspiracy was alleged to have begun. The government argues that there is a sufficient connection between the defendants' offenses because the cocaine dealings "provided the genesis" of the marijuana operation and because the same informant was involved in both the cocaine and marijuana transactions. We must disagree. The former argument is irrelevant; it fails to address how MacDonald was connected to the cocaine dealings. The latter argument would support joinder for trial of every defendant with whom a government informant had transacted.

Nevertheless, misjoinder requires reversal only if it "result[ed] in actual prejudice because it 'had substantial and injurious effect or influence in deter-

mining the jury's verdict.'" United States v. Lane, 106 S. Ct. 725, 732 (1986) (quoting Kotteakos v. United States, 328 U.S. 750, 776 (1946)). The Lane Court suggested several factors that might lead to a finding of prejudice: (1) failure to give limiting instructions; (2) evidence of guilt that is not overwhelming; (3) admission of evidence that would be inadmissible in a trial of only properly joined defendants and counts; (4) evidence on the improperly joined charges that is indistinct and not easily segregated; and (5) en masse trial of numerous defendants. See id. at 732 and n.13. None of these factors is present here.

First, the trial court cautioned the jury during trial and in its instructions

that it should consider the cocaine evidence only against Sazenski. Second, it is probable that evidence of Sazenski's cocaine dealings would have been admissible in a joint trial on the marijuana charge to rebut Sazenski's entrapment defense.[6] See Fed. R. Evid. 404(b). Third, the evidence of the cocaine transactions was distinct and easily segregated from the evidence of the marijuana transaction. Finally, because there were only two defendant, the danger of guilt by association inherent in en masse trials was substantially allayed. Cf. Grey Bear, slip op. 25-26.[7]

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6. MacDonald argues that this evidence would have been inadmissible had he gone to trial alone. This argument is inapposite, however, because MacDonald properly could have been joined with Sazenski for trial on the marijuana conspiracy charge.

7. In light of these findings, we find it

MacDonald argues that joinder of the cocaine and marijuana charges caused jury confusion, pointing to the jury's questions about the marijuana conspiracy charge. See supra n.2. Those questions, however, did not indicate that the jury was confused about the connection between the cocaine and marijuana charges; its queries were addressed solely to the meaning of the marijuana conspiracy charge. Thus, the jury's confusion was not caused by the misjoinder. Because our review of the record has uncovered no basis for a finding of prejudice, we must hold that the misjoinder in this case was harmless error. The defendants' convic-

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unnecessary to address whether the evidence against MacDonald was so strong as to be "overwhelming."

tions are affirmed.[8]

A true copy.

Attest:

CLERK, U.S. COURT OF

APPEALS, EIGHTH CIRCUIT.

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8. We find Sazenski's argument that he was prejudiced by the admission into evidence of $480,000 in cash to be without merit.

APPENDIX B

UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

JUDGMENT

No. 87-5110MN

United States of America,	*	
Appellee,	*	Appeal from the United States
vs.	*	District Court for the District of
Edward William MacDonald,	*	Minnesota
Appellant.	*	

This appeal from the United States District Court was submitted on the record of the district court, briefs of the parties and was argued by counsel.

After consideration, it is ordered and adjudged that the judgment of the district court in this cause be affirmed in accordance with the opinion of this

Court.

November 16, 1987

A true copy.

ATTEST. /s/ Robert D. St. Vrain

Clerk, U.S. COURT OF APPEALS,

EIGHTH CIRCUIT

MANDATE ISSUED: DECEMBER 7, 1987

Filed: 12/9/87

APPENDIX C

UNITED STATES DISTRICT COURT

DISTRICT OF MINNESOTA

UNITED STATES OF AMERICA,	*	
Plaintiff,	*	INDICTMENT
v.	*	
	*	(21 U.S.C.
DENNIS FRANK SAZENSKI,	*	§841(a)(1))
Defendant.	*	

THE UNITED STATES GRAND JURY CHARGED THAT:

COUNT I

On or about the 22nd day of January, 1986, in the State and District of Minnesota, the defendant,

DENNIS FRANK SAZENSKI,

did knowingly and intentionally distribute approximately two ounces of cocaine, a Schedule II controlled nar-

cotic drug substance, in violation of Title 21, United States Code, Section 841(a)(1).

COUNT II

On or about the 15th day of April, 1986, in the State and District of Minnesota, the defendant,

DENNIS FRANK SAZENSKI,

did knowingly and intentionally distribute approximately one ounce of cocaine, a Schedule II controlled narcotic drug substance, in violation of Title 21, United States Code, Section 841(a)(1).

COUNT III

On or about the 18th day of April, 1986, in the State and District of Minnesota, the defendant,

DENNIS FRANK SAZENSKI,

did knowingly and intentionally dis-

tribute approximately one ounce of cocaine, a Schedule II controlled narcotic drug substance, in violation of Title 21, United States Code, Section 841(a)(1).

A TRUE BILL

UNITED STATES ATTORNEY

FOREPERSON

APPENDIX D

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

UNITED STATES OF AMERICA,	*	
Plaintiff,	*	INDICTMENT
v.	*	
JOSEPH MICHAEL SAZENSKI, DENNIS FRANK SAZENSKI, and EDWARD WILLIAM MACDONALD,	*	(21 U.S.C. §§841(a)(1) and 846) (18 U.S.C. §2)
Defendants.	*	

THE UNITED STATES GRAND JURY

CHARGES THAT:

COUNT I

On or about the 3rd day of October, 1986, in the State and District of Minnesota, the defendant,

JOSEPH MICHAEL SAZENSKI,

did knowingly and intentionally attempt to possess with intent to distribute approximately 1,500 pounds of marijuana, a Schedule II controlled drug substance; in violation of Title 21, United States Code, Sections 841(a)(1) and 846.

COUNT II

On or about the 3rd day of October, 1986, in the State and District of Minnesota, the defendants,

DENNIS FRANK SAZENSKI and
EDWARD WILLIAM MACDONALD,

each aiding and abetting the other, did knowingly and intentionally attempt to possess with intent to distribute approximately 1600 pounds of marijuana, a Schedule I controlled drug substance; in violation of Title 21, United States Code, Sections 841(a)(1) and 846.

In furtherance of the conspiracy and

to effect the objects thereof, the defendants did commit the following:

OVERT ACTS

1. On September 17, 1986, Dennis Frank Sazenski and Edward William MacDonald met with Special Agent Michael Leonard of the Drug Enforcement Administration at the Tozai Restaurant in Plymouth, Minnesota and discussed the purchase of 3,000 pounds of marijuana.

2. On October 1, 1986, at the Holiday Inn Hotel in Brooklyn Center, Minnesota, Dennis Sazenski and MacDonald obtained marijuana samples from Special Agent Leonard.

3. At approximately 9:45 a.m. on October 2, 1986 at the Embassy Hotel in Bloomington, Dennis Sazenski and MacDonald met with Special Agent Leonard and Dennis Sazenski told Special Agent

Leonard he would contact "Joey" that day and get "Joey's" share of the money for the marijuana transaction.

4. At approximately 9:55 a.m. on October 2, 1986, at the Embassy Hotel in Bloomington, MacDonald obtained two additional marijuana samples from Special Agent Leonard.

5. On October 2, 1986, at approximately 12:40 p.m., Dennis Sazenski and MacDonald met with Joseph Michael Sazenski in downtown Minneapolis.

6. On October 3, 1986, at approximately 1:50 p.m., Dennis Sazenski and MacDonald met with Special Agent Leonard at the Ramada Inn Hotel in Bloomington and discussed the purchase of 6,200 pounds of marijuana for a purchase price of $350,00 per pound.

7. On October 3, 1986, at ap-

proximately 6:30 p.m., Joseph Sazenski met with Dennis Sazenski, MacDonald and Special Agent Leonard at the Ramada Inn Hotel in Bloomington and told Special Agent Leonard he could sell the entire load of 6200 pounds.

8. On October 3, 1986, at approximately 7:45 p.m., Joseph Sazenski traveled to "The Vault" in Edina, Minnesota and obtained approximately $300,000 cash.

9. On October 3, 1986, at approximately 8:25 p.m., at the Crystal Airport, Joseph Sazenski loaded approximately eight bales of marijuana into his van.

10. On October 3, 1986, at approximately 11:00 p.m., Dennis Sazenski and MacDonald traveled to the Crystal Airport where they inspected bales of

marijuana.

A TRUE BILL

UNITED STATES ATTORNEY

FOREPERSON